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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 775

CHECKER CAB COMPANY AND ITS MEMBERS, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A13) is not yet officially reported. The Board's decision and order in the unfair labor practice case (J.A. 16a-26a)[1] are reported at 153 NLRB 651. The Board's decision and direction of election in the under-

[1] "J.A." refers to the Joint Appendix filed in the court of appeals.

lying representation case (J.A. 2a-15a) are reported at 141 NLRB 583.

JURISDICTION

The decree of the court of appeals was entered on October 4, 1966 (Pet. App. A14). The petition for a writ of certiorari was filed on November 16, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the petition at pp. A15-A16.

QUESTIONS PRESENTED

A number of taxicab owners operating in one city are members of a corporation through which they provide a unified cab service to the public and to which they have delegated control over many important working conditions of the employees driving their cabs. The questions presented are:

1. Whether, in the circumstances of this case, the Board properly concluded that the corporation and all of its members constituted joint employers of all employee-drivers for purposes of collective barganing under the National Labor Relations Act.

2. Whether the Board reasonably exercised its discretion to determine bargaining units in concluding

that all such employee-drivers constituted an appropriate bargaining unit.

STATEMENT

After a hearing on a representation petition filed by the Union [2] seeking certification as the bargaining representative of all drivers employed by petitioners, Checker Cab Company and its members (J.A. 241a-243a), the Board found the following facts:

Checker Cab Company ("Checker") is a Michigan nonprofit membership corporation, formed to enable its member taxicab owners to associate for their mutual benefit, to standardize rates, to improve and maintain operating procedures, and to provide the City of Detroit with an efficient and systematic taxicab service (J.A. 2a, 18a; 41a-42a, 328a). During 1961 approximately 286 owner-operators of cabs were members of Checker; they operated approximately 900 cabs, which had a combined gross revenue of $7,000,000 (J.A. 3a). Members are entitled to display on their cabs a distinctive black and white checker-board emblem and the words "Checker Cab"; and each cab bears, for purposes of record-keeping and instant identification, a number assigned by Checker (J.A. 3a; 42a-43a). Checker maintains a dispatch system, relaying requests to available cabs by telephone or radio and instructing answering drivers where to pick up customers (J.A. 3a, 5a; 58a, 136a-138a, 166a). It also arranges for the sale of advertising carried on

[2] Local 10, Transportation Services and Allied Workers, Seafarers International Union of North America, AFL-CIO.

all members' cabs and periodically distributes the advertising revenue to its members. Further, Checker purchases forms, such as "receipt books" and "trip tickets," which it sells or distributes to members for use by their drivers. And for the many customers charging their fares, Checker maintains a centralized accounting system whereby it collects the charged fares and then distributes them to the appropriate members (J.A. 3a-4a; 65a-71a, 82a-89a, 135a-136a, 147a-148a, 159a-160a, 305a-306a).[3]

Each member owns and maintains his own cabs, has ultimate authority to hire and discharge the drivers of his cabs, sets their wages, deducts their social security and federal income taxes, and provides them with unemployment and health insurance (J.A. 4a; 144a-145a, 148a-149a). All prospective drivers, however, must first apply at Checker's main office where they fill out a form prepared by Checker and are interviewed by a Checker employee. If an applicant is deemed satisfactory, he is then referred by Checker to a member in need of additional drivers (J.A. 4a, 6a; 71a-72a, 75a-79a, 81a, 156a-159a, 182a, 212a). Upon commencing employment, each driver is given a copy of the "Checker Cab Driver's Manual" and "Things You Should Know," both published by Checker. These publications contain rules and regulations which have been drawn up and approved by a majority vote of the members and govern in detail

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[3] Checker finances its expenses through the collection of annual dues from each of its members, amounting to more than $377,000. It employs directly 15 employees (who do not drive cabs) for the performance of its functions (J.A. 3a).

the drivers' everyday operation of the members' cabs. They prescribe, *inter alia*, the dress and demeanor of the drivers, and the procedure for lining up at cab stands and other locations and for stopping and answering telephones at cab stands. They also require monthly inspection of the cabs by a Checker supervisor and notification to Checker when the cabs travel beyond certain city limits. Violation of the rules can result in the driver's discharge (J.A. 4a-5a; 113a-115a, 118a, 161a, 169a-170a, 260a-263a, 273a-281a, 292a, 294a-300a).

Checker also maintains a Board of Review which is composed of three members, who have been elected by the membership. The Board of Review meets weekly to consider complaints filed against the drivers by "roadmen" (starters employed by Checker), other drivers, members, or the public alleging, *inter alia*, violations of the rules and regulations. After a hearing the Board of Review can effectively discipline a charged driver. Automobile insurance for all of the members' cabs is underwritten by one insurance company. A driver considered to have a poor safety record is brought before an Insurance Board of Review, composed of three members, two of whom also sit on the Board of Review. Like the Board of Review, the Insurance Board can effectively discipline the drivers (J.A. 5a-6a; 60a-64a, 118a-119a, 163a-164a, 224a-226a, 231a-234a).

Upon the foregoing facts the Board (with two Members dissenting) concluded that Checker Cab Company and its members are engaged in the integrated, common enterprise of operating Checker cabs in Detroit

and sufficiently share control over the working conditions of the employees driving cabs owned by the members to be joint employers of those employees (J.A. 6a-7a, 11a). The Board further concluded that all employees driving cabs owned by the members constitute an appropriate unit for collective bargaining, since they do identical driving work under common employment conditions for "joint employers in a common enterprise" and have mutual employment interests (J.A. 8a, 11a).[4] Accordingly, the Board directed an election among the drivers (J.A. 12a-13a).

The Union won the election and was certified by the Board as the bargaining representative of the employee-drivers of Checker cabs, but Checker and its members refused the Union's request to bargain, asserting that the Board's joint-employer and unit determinations were invalid (J.A. 17a, 21a; 341a-343a). In the ensuing unfair labor practice case, the Board, reaffirming its prior determinations, held that the refusal of Checker and its members to bargain violated Section 8(a)(5) and (1) of the Act (J.A. 16a-23a). Accordingly, the Board ordered them to cease and de-

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[4] Specifically, the unit found appropriate by the Board is as follows, (J.A. 11a-12a, emphasis added):

> All full-time and regular part-time drivers, including lease drivers, of Checker cabs owned by persons, partnerships, corporations, and associations who are members (senior, associate, or otherwise) of Checker Cab Company [footnote omitted], Detroit, Michigan, but excluding office clerical employees, *member-drivers*, casual drivers, roadmen, garage employees, and all supervisors as defined in the Act.

sist from their unfair labor practices and to bargain with the Union upon request (J.A. 23a-24a).

The court of appeals enforced the Board's order. It held that the facts demonstrated " 'sufficient indicia of control' " on the part of Checker and its members "to warrant the joint employer finding of the Board," and that the Board's unit finding was also within the allowable limits of the broad "discretion which the Board has * * * in appropriate bargaining unit proceedings" (Pet. App. A12-A13).

ARGUMENT

The decision of the court of appeals, which turns on the unique facts of this particular case, is correct and not in conflict with the decision of any other circuit. There is no occasion for further review.

1. This Court has recognized that separate persons or business entities may be required to bargain together as joint employers of an appropriate unit of employees if each "posses[es] sufficient indicia of control to be an 'employer,' " and that whether such control exists is "essentially a factual issue." *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481.[5] Applying this

[5] Since *Boire* was a suit to enjoin the Board's direction of election, this Court did not pass on the merits of the Board's joint-employer finding; however, that finding was recently sustained in *National Labor Relations Board* v. *The Greyhound Corp.* (C.A. 5), November 17, 1966, 63 LRRM 2434. See also *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261, 263; *National Labor Relations Board* v. *Lund*, 103 F. 2d 815, 818-819 (C.A. 8); *National Labor Relations Board* v. *Long Lake Lumber Co.*, 138

principle here, the court below concluded that substantial evidence supported the Board's finding that Checker possessed sufficient control over working conditions to make Checker and its members joint employers of the employees driving the members' cabs. This evidentiary ruling is clearly correct. As the court below summed up (Pet. App. A13):

> In this case, a group of employers have banded themselves together so as to set up joint machinery for hiring employees, for establishing working rules for employees, for giving operating instructions to employees, for disciplining employees for violation of rules, for disciplining employees for violation of safety regulations. * * *

Accepting the finding that petitioners are joint employers of all employees driving members' cabs, it follows that the Board's further determination that all such drivers constitute an appropriate bargaining unit was a proper exercise of the "large measure of informed discretion" which the Act vests in the Board, and which is "rarely to be disturbed." *Packard Motor Car Co.* v. *National Labor Relations Board*, 330 U.S. 485, 491. The record demonstrates that all of the employee-drivers have "mutual employment interests" and "are doing identical driving work * * * under common employment conditions and regulations" for

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F. 2d 363, 364 (C.A. 9); *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67, 71-72 (C.A. 3); *National Labor Relations Board* v. *West Texas Utilities Co.*, 218 F. 2d 824 (C.A. 5), enforcing 108 NLRB 407, 413-414, certiorari denied, 349 U.S. 953; *Butler Bros.* v. *National Labor Relations Board*, 134 F. 2d 981, 985 (C.A. 7).

an "integrated enterprise" (J.A. 8a, 11a); where employees "have such a common relationship to the enterprise and to [each] other * * * [their] inclusion * * * in a single unit is appropriate." *Packard Motor Car Co.* v. *National Labor Relations Board, supra,* at 491.

2. Petitioners' contention (Pet. 8, 12) that the Board's rulings "nullify the plain intent of Congress in adopting the independent contractor amendment in 1947" is without merit. That amendment excludes "any individual having the status of an independent contractor" from the definition of "employee" in Section 2(3) of the Act. Its purpose was to exclude from the coverage of the Act persons who, by common law standards, were independent contractors, and thereby to overrule *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U.S. 111, in which the Act was applied to newsboys (see Pet. App. A16-A-18). Here, the Board has not applied the Act to independent contractors; it has not required Checker to recognize the Union as the representative of the member cab owners (the independent contractors), even when they themselves drive cabs.[6] The only persons included in the bargaining unit, and thus the only persons for whom the Union has acquired representation rights, are the drivers of the cabs (other than the members themselves). It is undisputed that these drivers are "employees" within the meaning of

[6] As shown in n. 4, *supra,* members who drive their own cabs ("member-drivers") are expressly excluded from the bargaining unit.

the present Act. In essence, petitioners' argument is that, since the members of Checker are independent contractors, the Board is precluded by the independent contractor amendment from finding them to be joint employers. But, as the Court pointed out in *Boire* v. *Greyhound Corp.*, *supra*, at 481, this argument "misconceives * * * the import of the substantive federal law"; the status of Checker and the cab owners as joint employers depends solely upon "[w]hether * * * [they] possessed sufficient control over the work of the employees" involved, "a question which is unaffected by any possible determination as to [the cab owners'] status as * * * independent contractor[s]."[9]

Nor is there substance to petitioners' contention (Pet. 12-13) that the Board, in finding a single unit comprised of all employees driving the members' cabs to be appropriate for bargaining, created an unusually large and "unwieldly" bargaining unit. The Board has merely recognized the joint-employer pattern established by the parties themselves. As the Board pointed out (J.A. 7a, n. 5), "[h]aving elected to subject their employees to regulation on a joint basis, the employers within Checker must likewise accept the

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[9] Petitioners' reliance (Pet. 11) on *United States* v. *Silk*, 331 U.S. 704, is misplaced. The question there was whether certain individuals were employees or independent contractors for purposes of the Social Security Act; the case did not present the issue here, *i.e.*, whether the independent contractor had so delegated control over the working conditions of his employees to another person as to make them both employers of the employees.

statutory right of their employees to join together for the purposes of collective bargaining." [8]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1966.

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[8] *Newark Twentieth Century Taxicab Ass'n*, 50 LRRM 1273, relied upon by petitioners (Pet. 13-14), is distinguishable. In that case, a single unit of all drivers was held inappropriate because there, unlike here, the evidence did not establish that the cab association and its members were joint employers of the drivers involved; there was no attempt to provide an integrated cab service, nor was there common control over the drivers and their working conditions.

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